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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 86

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH LEROY BEHRENS

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 30-37) is reported at 312 F. 2d 223. An opinion of the district court in a previous proceeding is reported at 190 F. Supp. 799 (S.D. Ind.).

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1962 (R. 38-39). The petition for a writ of certiorari was filed on March 7, 1963, and was granted on April 29, 1963 (R. 39, 373 U.S. 902). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the respondent was required to be present when his sentence was reduced and modified under the provisions of 18 U.S.C. 4208(b).

STATUTE AND RULES INVOLVED

18 U.S.C. 4208 provides in pertinent part:

§ 4208. Fixing eligibility for parole at time of sentencing.

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be

helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or, (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever not in-

compatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

Federal Rules of Criminal Procedure

Rule 35 provides in pertinent part:

* * * The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 43 provides in pertinent part:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * * The defendant's presence is not required at a reduction of sentence under Rule 35.

STATEMENT

On December 20, 1960, the respondent was convicted by a jury, in the United States District Court for the Southern District of Indiana, of an assault with intent to murder within the special maritime and territorial jurisdiction of the United States (Federal Penitentiary), in violation of 18 U.S.C. 113(a) (R. 2, 4-5, 7). After the conviction, the trial judge discussed with counsel the question of fixing sentence—whether to impose one immediately, to await a presentence report, or to invoke the procedure prescribed

in 18 U.S.C. 4208(b) (R. 8-9). The respondent stated that he desired to have the case disposed of that day (R. 9). The judge indicated that he favored the use of Section 4208(b) in this case because his past experience had shown that no sentence could act as a deterrent to the commission of penitentiary offenses (R. 10-11). It was the court's view that the penal authorities should make a study of this type of criminal activity. The judge indicated that since this was an internal penal problem he would be inclined to follow their recommendation under section 4208 (R. 12). He also encouraged the respondent to try to do better (R. 12). Then the court stated (R. 12):

Well, since it is the desire of the Defendant to have this case disposed of today, I will dispose of it today. But it will be under the flexible provisions of 4208 * * *

The judge afforded the respondent an opportunity to make a statement but respondent declined to do so despite encouragement from the judge (R. 13). In response to a question as to whether respondent had any remorse, Behrens replied (R. 13):

My remarks ain't fit in your ears.

The COURT: None whatsoever?

The DEFENDANT: (Shakes head.)

The COURT: Have you given up entirely?

The DEFENDANT: It's just simpler to get it over with.

The court then heard again from respondent's counsel and agreed that Behrens needed help (R. 13-14). The judge stated he would be inclined to impose a

very substantial sentence, except that he was convinced that maximum sentences in these cases provided no deterrence (R. 14).

The court then imposed a sentence of imprisonment for twenty years (the maximum), directed the study prescribed in the statute, and provided that, after the results were furnished to the court, "the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, United States Code, Section 4208(b)." (R. 15-16.) A written judgment was then entered (R. 17-18).

On January 17, 1961, respondent sought leave to obtain a transcript in forma pauperis (R. 19-20). The request was denied on the ground that the time to appeal had expired on December 30, 1960, so that the transcript would be useless (R. 21-22). See *United States v. Behrens*, 190 F. Supp. 799 (S.D. Ind.).

On June 13, 1961, the district court, after considering the report of the Bureau of Prisons, but without requiring the presence of respondent or his counsel, entered an order providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years" and that, under the provisions of 18 U.S.C. 4208(a) (2), the Board of Parole could decide when the respondent should be eligible for parole (R. 23).

On February 21, 1962, respondent, *pro se*, submitted a motion to vacate sentence¹ which was considered under the provisions of 28 U.S.C. 2255 and denied on

¹The motion primarily complained of contradictory evidence at the trial, the judge's remarks at the sentencing, and the denial of a request for mental examination on the first day of trial (R. 24-27).

April 11, 1962 (R. 28-29). In the court of appeals, respondent's counsel argued, *inter alia*, that the absence of respondent and his counsel at the time of the reduction in sentence presented a serious question of due process.

A majority on the court of appeals held that it was a fundamental requirement of due process that respondent be present, with counsel, and have an opportunity for allocution at the time the sentence was reduced. The court reasoned that the reduced sentence under the special provisions of 18 U.S.C. 4208 (b) was the "final judgment" which terminated the litigation, rather than the sentence as originally imposed, and that the right of allocution was thus more important at that time (R. 30-35).

The dissenting judge was of the view that the presence of the defendant was not required by due process and that the matter was one for the sound discretion of the trial judge, to be exercised in the light of the circumstances of each case. He noted that in the case at bar there was no need to consult the defendant but only to consider the expert medical advice. He therefore concluded that the district court in this instance had not abused its discretion in failing to require petitioner's presence at the reduction of sentence (R. 36-37).

ARGUMENT

INTRODUCTION AND SUMMARY

The question here—whether a defendant must be present if a maximum sentence imposed preliminarily under 18 U.S.C. 4208(b) is reduced—is closely allied to the question presented in *Corey v. United States*,

No. 31, this Term: when the time to appeal begins to run if the procedures of that statute are utilized. As the statute is written, that question—what constitutes the final judgment for purpose of appeal—seems to be the same as the question what is the final judgment for the purpose of determining whether the defendant must be present. Nor is this a purely technical matter. The two questions have a close practical connection. Thus, if the Court should decide, contrary to our view in *Corey*, that a defendant should be allowed to take his appeal from the reduced sentence, this would be a consideration justifying the conclusion that he must be present at the time of the reduced sentence. For, if the defendant had no attorney, he could be advised by the court of his right to appeal pursuant to Rule 37(a)(2); and, if he did have counsel, he would have the opportunity to consult with counsel regarding an appeal. On the other hand, if there is no right of appeal from a reduced sentence, there is less reason to require a defendant's presence at that time.

In our brief in *Corey*, we limit our discussion to the narrow question of appealability. We undertake here to deal with the general purposes and legislative history of the statute. From this examination, we conclude that Congress intended the original maximum sentence imposed under Section 4208(b) to be the final judgment concluding the criminal case, both for the purpose of the appeal and for the purpose of determining whether the presence of the defendant is required.

I

The language, history and background of the statute indicate that the initial sentence (deemed to be for the maximum term) is the final judgment concluding the criminal case and that Congress did not require that the defendant be present when the sentence is affirmed or reduced.

A. Section 4208 was one of three parts of a bill passed in 1958 to provide better sentencing methods. Its aim was to make possible the individualization of sentences by affording a variety of release techniques, all of them discretionary with the judge. Subsection (a) sets forth two methods of giving the Parole Board broader authority to release a prisoner if persuaded to do so by a diagnostic study. Subsection (b) enables the sentencing judge to avail himself of a diagnostic study, within a six-months period, for purposes of deciding upon a change of sentence. Plainly, under subsection (a), the first sentence is the final judgment for purposes of appeal and allocution, regardless of what term is actually served. There is a strong inference that Congress similarly regarded the criminal case as concluded by the initial sentence of imprisonment for purposes of subsection (b), and that the likelihood of a reduction in the term was not intended to affect the finality of the judgment of conviction. Although the statute is silent as to reappearance of the defendant, it significantly provides that whatever term must be served shall run from the date of the original commitment and forecloses any possibility of an increase in the indeterminate sentence.

B. The legislative history supports the view that the presence of a defendant is not required when sentence is affirmed or reduced. In the background were the Federal Youth Corrections Act, which contains an indeterminate sentence provision, and the Federal Rules of Criminal Procedure, which specifically declares that a sentence may be reduced without requiring the presence of the defendant. Rules 35 and 43. The same approach was followed in enacting Section 4208(b). Plainly, Congress did not view the action taken on reconsideration as the imposition of sentence requiring the presence of the defendant under Rule 43. In considering the new provision, Congress repeatedly stated that it desired to enable the sentencing judge to extend the period during which sentence might be reduced from 60 days (the limit under Rule 35) to a maximum of six months. The debates and reports also indicate that, as in proceedings under Rule 35, the sentence might be modified under the new procedure without requiring the presence of the defendant.

C. The weight of authority supports the view that trial judges should have discretion whether to require a return of the prisoner when his sentence is reduced. This is the view of the commentators, the judicial sentencing institutes and the various district courts which have considered the matter. The only cases to the contrary are the case at bar and a subsequent case currently pending on petition for certiorari.

• Due process does not require the personal presence of an offender when his sentence is reduced.

A. Presence is not an element of due process in circumstances where the personal appearance of a defendant would not materially aid in resolution of the issue involved. While the Constitution provides that a defendant must be confronted by the witnesses against him, it is clear that many things before, during and after a trial may be accomplished in his absence. Sentencing, moreover, has always been recognized as discrete from the process by which guilt is determined.

There is no reason, from the standpoint of fundamental fairness, why a reduction in sentence under Section 4208(b) should require the defendant's presence. All of the normal incidents of the criminal case have been completed before a diagnostic study is made under Section 4208. A pre-sentence report has usually been prepared; counsel and defendant have been accorded an opportunity to be heard; a sentence has been imposed; it has been incorporated in a judgment forming the basis for an actual commitment to a federal penitentiary. The judge's conclusion that he may be aided by additional advice from other sources, i.e., an expert diagnostic report, does not imply a practical necessity to hear further from the defendant. The defendant has no right to test the aids or the information which the judge utilizes in deciding upon an appropriate sentence. *Williams v. New York*, 337 U.S. 241. The question of his recall is properly committed to the informed discretion

of the district judge, who is in a position to determine whether any useful purpose would be served thereby.

B. This case illustrates the fairness of the procedures followed and the beneficial purposes of Section 4208. Before his initial sentencing, respondent was encouraged to speak in his own behalf. He refused to express any contrition and he offered no considerations in mitigation of his offense (assault with intent to murder, committed in a penitentiary). The judge expressed his opinion that the offender deserved a heavy sentence but nonetheless concluded that he would be guided by the recommendation of the prison authorities. Having invoked Section 4208 and having received a full report and study, the judge thereafter reduced the sentence from twenty years (the maximum) to five years, with further provision for still earlier release if the board of parole should decide that it was warranted.

If the judge, operating under customary procedures, had given a ten or twenty-year sentence in the first instance, it would not be seriously suggested that a further hearing would be required to pass upon a motion to reduce sentence. It is difficult to see on what basis the course which was actually followed—one which was essentially the same except that the judge was afforded the benefit of an expert diagnostic study—can be said to suffer from constitutional infirmity.

THE LANGUAGE OF THE STATUTE, ITS LEGISLATIVE HISTORY, AND ITS MANIFEST PURPOSE ALL INDICATE THAT THE INITIAL MAXIMUM SENTENCE IS THE FINAL JUDGMENT CONCLUDING THE CRIMINAL CASE AND THAT THE PRESENCE OF THE DEFENDANT IS NOT REQUIRED WHEN THAT SENTENCE IS SUBSEQUENTLY REDUCED.

A. THE LANGUAGE AND STRUCTURE OF THE STATUTE SHOW THAT THE INITIAL JUDGMENT UNDER SECTION 4208(B) IS THE ONE THAT CONCLUDES THE CRIMINAL CASE

In 1958, in response to widespread sentiment, Congress enacted legislation to improve sentencing practices in the federal courts. The measure was in three parts. One provided for judicial sentencing institutes to be held in the various circuits. See 28 U.S.C. 334. Another part extended the application of the Federal Youth Corrections Act to offenders between 22 and 26. See 18 U.S.C. 4209 and 5010. The third portion of the legislation provided greater flexibility in the sentencing of adults.² This was 18 U.S.C. 4208, of which subsection (b) is before the Court.

Section 4208 is designed to make possible the individualization of sentences. This is accomplished by providing a variety of release techniques to be used at the discretion of the sentencing judge in meeting different situations. Subsection (a), *supra*, p. 2, permits a trial judge to delegate wide discretion to the Parole Board. He may "upon entering a judgment of conviction" either (1) set a date for eligi-

² These provisions do not apply to offenses where mandatory penalties are provided. 72 Stat. 847. See *Robinson v. United States*, 313 F. 2d 817 (C.A. 7).

bility for parole which is less than the normal one-third of the term [see 18 U.S.C. 4208(a)(1)], or (2) set a maximum sentence and allow the board of parole complete authority to determine when the offender will be eligible for parole [18 U.S.C. 4208(a)(2)]. Under Subsection (b) the judge initially commits the convict for the maximum term, subject to later revision. Here, however, it is the judge himself who reconsiders the sentence originally imposed. Within three months after sentencing (or six months, if he extends the time), the judge may (1) grant probation, (2) affirm the sentence, or (3) reduce the initial sentence. Under both subsections, the ultimate decision is made with the benefit of a diagnostic study of the offender in a penal institution, as provided in 18 U.S.C. 4208(c).¹

There is, of course, no question but that under subsection (a) of Section 4208, the final sentence in the criminal case is that imposed by the judge, regardless of what sentence is actually served pursuant to the determinations of the Board of Parole. We believe that Congress similarly regarded the criminal case, as such, to be concluded by the initial sentence under Section 4208(b). In other words, the likelihood of a subsequent modification of the sentence by the trial

¹ For a description of how a diagnostic report under this section is prepared, see Bennett, *Evaluation of the Offender by the Bureau of Prisons*, 26 F.R.D. 231, 331-336; Bennett, *Individualizing the Sentencing Function*, 27 F.R.D. 293, 359, 362-363; Dr. Smith, *Observation and Study of Defendants Prior to Sentence*, 26 Federal Probation (June 1962), pp. 6-10. For a chart showing the use of the section by districts in 1962, see 32 F.R.D., 249, 316-317.

judge was not intended to affect the finality of the judgment of conviction.

While the statute itself is silent regarding the re-appearance of a defendant, the structure of Section 4208 contemplates that all the normal procedures of a criminal case, which include the appearance of a defendant at his sentencing, will have been completed before the study provided by Section 4208 begins. No sentence can ever be increased under Section 4208(b). In essence, what the Act provides is that an indeterminate sentence is originally imposed, which can later be modified in a number of ways, either by the Board of Parole (under 4208(a)) or by the court (under 4208(b)), or by any combination which lends itself to an appropriate plan of rehabilitation for the offender. The words "[u]pon entering a judgment of conviction" which introduce subsection (a) reasonably apply as well to the alternate method of study provided in subsection (b). This is reinforced by the explicit provision in subsection (b) that whatever term the defendant must serve is to "run from date of original commitment under this section." In short, the initial commitment is the final judgment in the criminal case for which a defendant's presence is required.

B. THE LEGISLATIVE HISTORY SUPPORTS THE VIEW THAT THE PRESENCE OF THE DEFENDANT IS NOT REQUIRED WHEN HIS SENTENCE IS AFFIRMED OR REDUCED

1. Historical background of the Act

The present statute, 18 U.S.C. 4208(b), had its origin in long-standing dissatisfaction with sentencing techniques. While many States were experimenting

with various post-conviction solutions,⁴ federal sentencing practices had not kept abreast of modern penology. A compilation in 1937 showed that there were indeterminate sentence laws of varying force and scope in thirty-nine jurisdictions, but none in the federal system. See 50 Harv. L. Rev. 677, 678, fn. 4.⁵

United States Attorneys General, for a number of years beginning in 1938, called attention to wide disparities and gross inequalities among sentences.⁶ In 1938, a study of the problem undertaken in the Department of Justice was made available to the Judicial Conference,⁷ which, in 1939, appointed a committee of Judges Learned Hand, Evans and Wilbur to consider an indeterminate sentence law.⁸ The Judicial Conference for 1940 favored the adoption of a plan for indeterminate sentences drafted in the Attorney General's Office but modified so that a board in each circuit or at each federal prison should exercise the powers of a parole board. Insofar as pertinent, this draft provided: ⁹

⁴ See Attorney General's Survey of Release Procedures, 1939, particularly Volume I.

⁵ See also Lindsay, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 Journal of the American Institute of Criminal Law and Criminology 9, 98-107.

⁶ See Annual Report of The Attorney General of the United States, for fiscal year 1938, pp. 6-7; for fiscal year 1939, pp. 6-7; for fiscal year 1940, pp. 5-7; 27-28; for fiscal year 1941, pp. 11-12; for fiscal year 1943, pp. 18-19; for fiscal year 1944, pp. 37-38.

⁷ Report of the Judicial Conference. September Session, 1938, p. 13.

⁸ Report of the Judicial Conference. September Session, 1939, p. 11.

⁹ Report of the Judicial Conference. October Session, 1940, pp. 14, 15.

Sec. 1. In any case in which a court of the United States imposes a sentence of imprisonment for an offense punishable by imprisonment for a term exceeding one year, such sentence shall be for the maximum term fixed by law. Within four months after any defendant commences to serve a sentence imposed as aforesaid, the Board of Indeterminate Sentence and Parole shall fix a definite term of imprisonment that the defendant shall serve. Such term shall not be more than the maximum term fixed by law in respect of the offense of which the defendant has been convicted; and if a minimum term is prescribed by law in respect of such offense, then the term fixed by said Board shall not be less than that so prescribed. In computing commutation for good conduct and in determining the date on which such defendant becomes eligible for parole, the term of imprisonment so fixed by the Board shall be deemed to be the term of imprisonment to which the defendant has been sentenced.

Sec. 2. * * * In addition, a hearing shall be accorded to the defendant before the Board or a member thereof, or before an examiner who shall report the proceedings to the Board. At such hearing the defendant shall have the privilege of being represented by counsel. * * *

Thus, early in the evolution of Section 4208(b), one finds the idea of imposing a modifiable indeterminate sentence which "shall be for the maximum term fixed by law."¹⁰ Under the proposal just quoted, the defendant

¹⁰ On the constitutionality of indeterminate sentences, the Attorney General's Survey of Release Procedures, Volume IV, p. 22, commented: "It is to be noted that it was only by holding

would never be returned to a court, since further proceedings would be reserved to the Board.

Opposition developed, principally on the ground that the proposed bill would take all control over sentences of more than one year out of the hands of trial judges.¹¹ The Judicial Conference proposed a further study under an expanded committee headed by Judge Parker.¹² A bill was approved which covered both adults and youthful offenders, but provided for the district judge to retain control of the sentence by modifying or affirming the sentence of the Board, if the judge so desired.¹³ Introduced on March 10, 1943, as H.R. 2140, 78th Cong., 1st Sess.,¹⁴ it provided in pertinent part (Title II):

the indeterminate sentence to be in legal effect a sentence for the maximum term that the courts preserved it from the objection of uncertainty and indefiniteness."

¹¹ Report to the Judicial Conference of the Committee on Punishment for Crime, June 1942, p. 6. Consequently, early legislation was dropped. See, *e.g.*, S. 1638, 87 Cong. Rec. 5166, and H.R. 4581, H. Rep. 1071, 77th Cong., 1st Sess.

¹² Report of the Judicial Conference, September Session, 1941, p. 9. Meanwhile, the American Law Institute in May 1940, adopted a Youth Correction Authority Act providing that persons under twenty-one, upon conviction, could be sentenced generally to the authority. Under this proposal, commitment to the authority would not normally be stayed by taking an appeal. See American Law Institute, Youth Correction Authority Act, Official Draft (second printing) June 22, 1940, § 19, p. 19.

¹³ It was contemplated that the bill would be effective only after a presentence report and after the judge had decided to sentence the defendant to imprisonment for more than one year. Report to the Judicial Conference of the Committee on Punishment for Crime, June 1942, p. 28.

¹⁴ A similar bill was introduced in the Senate as S. 895.

Section 1. When the judge, after a hearing in open court, determines that a sentence of imprisonment for more than one year should be imposed on an offender, the original sentence shall be to imprisonment generally, which shall be for the maximum term prescribed by law. When an offender shall be sentenced for more than one offense, the court shall determine and specify whether the sentences shall run concurrently or consecutively. Within six months after an offender commences to serve the original sentence, or within an additional period not exceeding six months if authorized by the court, the Division shall recommend to the court the term of imprisonment to be fixed by the definite sentence, stating the reasons therefor. The judge who imposed the original sentence, or any other qualified judge duly designated to act, may thereupon fix the definite sentence by modifying or affirming the original sentence. If the judge fixes a definite sentence different from that recommended by the Division, he shall state his reasons, which shall be reduced to writing and become a part of the records of the Division. If the Division shall not make its recommendation within the time herein limited, the court shall fix the definite sentence which the offender shall serve. If the Division files its recommendation within the time herein limited and the court does not fix a definite sentence within two months, the sentence recommended by the Division shall become the definite sentence and the clerk shall thereupon enter judgment accordingly. In no event shall the definite sentence be longer than the maximum term prescribed by law. When

an offender has appealed from a judgment of conviction and elects to enter upon the service of his original sentence, the definite sentence may be fixed notwithstanding the pendency of the appeal.

Sec. 2. In determining terms of imprisonment to be recommended by it, the Division shall consider all pertinent information. Before making a report and recommendation, each offender shall be personally interviewed by a member of the Division and under rules prescribed by the Board shall be accorded a hearing before one or more members of the Division as to the length of sentence to be recommended.

This proposal provided in substance that the sentence should be for the maximum term, and that in some cases the definite sentence as recommended by the Division could become effective without further participation of the judge and, obviously, without the reappearance of the defendant. At House hearings on the bill,¹⁵ there was discussion of the constitutionality of the provision whereby the definite sentence might take effect with no further action by the court. Judge Parker said, "The man is constitutionally sentenced to the maximum sentence, and he is not in a position to complain of a reduction in sentence. I think that takes care of the question of constitutionality."¹⁶ In this connection, the Federal Bar Associa-

¹⁵ Hearings were also held before the Senate Subcommittee. See Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on S. 895, 78th Cong., 1st Sess.

¹⁶ Hearings before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives, 78th Cong., 1st Sess. on H.R. 2140, p. 9.

tion of New York, New Jersey and Connecticut, and the Brooklyn Bar Association recommended that, when an offender's sentence was to be finally passed on by the judge, he be notified of his right to be represented by counsel. There was no proposal that the offender himself be brought back.¹⁷ It was also recognized that it was necessary to impose sentence in advance in order to lay a foundation for a procedure involving commitment to a penal institution.¹⁸

The bill did not then pass.¹⁹ In the years that intervened between H.R. 2140 (1943) and the passage of 18 U.S.C. 4208(b) (1958), many related bills were submitted to Congress, but no concerted effort was made to secure their passage. However, the youth provisions were separated and passed in 1950 as the Federal Youth Corrections Act, 18 U.S.C. 5005, *et seq.* This legislation contained many of the indeterminate sentence features. See 18 U.S.C. 5010. Also in the intervening years, the Federal Rules of Criminal Procedure were adopted, of which the significant ones for present purposes are Rule 35 providing for the reduction of sentence within 60 days and Rule 43 providing that "The defendant's presence is not required at a reduction of sentence under Rule 35." (See history of Rule 35, *infra*, p. 31). These assumed considerable significance in the immediate legislative history of Section 4208(b).

¹⁷ *Id.*, p. 53, 55.

¹⁸ *Id.*, p. 65, cf. p. 97.

¹⁹ Opposition was expressed to having the procedure apply to all sentences of more than a year. There was also opposition to having district courts state their reasons in writing when they imposed a sentence which differed from that recommended. Both of these features were eliminated in the present subsection.

2. *Legislative History of 18 U.S.C. 4208(b)*

On July 29, 1957, the Honorable Emanuel Celler introduced a series of bills on sentencing procedures which were widely circulated to the judiciary and other interested parties, with a request for comments (Federal Sentencing Procedures, Committee Print, Report to the Committee on the Judiciary, House of Representatives, 85th Cong., 2nd Sess., February 15, 1958. In March 1958, a subcommittee on sentencing of the Judiciary Committee on Administration of Criminal Law submitted a report substantially approving the bills proposed by Congressman Celler and offering an additional provision which was the immediate predecessor of 4208(b).²⁰ The subcommittee believed that the judges should be provided, if they desired, with a more complete study than was available from a probation officer's report. It observed that "Facilities for such studies are presently in existence, but authority is lacking to the judge to reduce or change a sentence after 2 months, which may not afford ample time to complete such study". Accordingly, the subcommittee recommended an additional section in the following terms:²¹

Upon the imposition of sentence the court may sentence in accordance with other existing provisions of law, or at its option, may

²⁰ The report is reprinted in the Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2nd Sess. on H.J. Res. 425, p. 37-40.

²¹ *Id.* p. 39, 70-71.

impose a tentative sentence to imprisonment generally, which shall be deemed to be for the maximum term prescribed by law; in such latter event the defendant shall be committed to the custody of the Attorney General for a complete study of the defendant as described in subsection (b) hereof, except that a report based on this study, together with any recommendations which the Director believes would be helpful in determining the disposition of the case, will be furnished to the court within 3 months unless the court grants time for further study not to exceed an additional 3 months. After receiving such reports and recommendations, the court may in its discretion: (a) reduce the sentence, or (b) place the defendant on probation as provided in section 3651 of this title.

Thus, from the beginning, Section 4208(b) was proposed as a supplement to Rule 35, providing a more generous period of time in which to investigate and consider a possible reduction of the sentence originally imposed. At the hearings before the House subcommittee, Judge Laws of the District of Columbia, who acted as chairman of the Judicial Conference Committee, noted that he had tried this same procedure (i.e., had requested recommendations from prison penologists) within the shorter limits of the 60-day period for reduction of sentence.²² In its report of June 23, 1958 (H. Rep. 1946, 85th Cong., 2d Sess., to accompany H.J. Res. 424), the Committee

²²*Id.* p. 29, 35.

recommended the language which now appears, unaltered, in Section 4208(b)."

In the analysis of the legislation, the report stated that this subsection, "would make it possible for the court, when confronted with the necessity of making a sentence determination in a particularly difficult case, to commit the defendant (technically under the statutory maximum term) to the Attorney General for a complete study over a period of 3 to 6 months. * * * At the present time, the judge is powerless to modify a sentence later than 60 days after it has begun, which is too brief a time to study and observe the prisoner thoroughly. This provision would extend the court's authority to modify a sentence to a period up to 6 months, thereby making feasible detailed studies of selected defendants before a final sentence must be formulated" (*op. cit.* 9). The report explicitly declared that the prisoner would not have to be present when final action on his sentence was taken, stating (*op. cit.* 10): "There is ample precedent for this provision" and citing Rule 43, F.R. Crim. P. (providing that "The defendant's presence is not required at a reduction of sentence under Rule 35.>").

The report on this section concluded (*op. cit.* 10):

In effect, for those cases in which the court needed further information about the defendant, the bill would extend to a period of 6

"No explanation was given for the elimination of the word "tentative" in describing the first sentence, nor for the addition of the phrase providing for "affirming" the sentence of imprisonment originally imposed.

months the court's present authority of 60 days to reduce a sentence. * * *

The House of Representatives eliminated the provisions for flexible parole eligibility and for committing a prisoner for study prior to final sentence (104 Cong. Rec. 13391-13401) but they were restored by the Senate (104 Cong. Rec. 15353). The Senate report accompanying this bill explained it in much the same terms as the House report, *supra* (Federal Sentencing, Report to accompany H.J. Res. 424, S. Rep. No. 2013, 85th Cong., 2d Sess., p. 4): "In effect this provision extends to a maximum period of 6 months in selected cases the court's power to modify the sentence, now restricted to 60 days under Rule 35 * * *."

The Conference Report, in commenting upon the present subsection, stated:

The net result of this provision is to extend to a maximum period of 6 months in selected cases the court's power to modify the sentence, now restricted to 60 days under rule 35, Federal Rules of Criminal Procedure * * *.

Federal Sentencing Procedures, Conference Report to accompany H.J. Res. 424; H. Rep. 2579, 85th Cong., 2d Sess., August 13, 1958, p. 2, and 104 Cong. Rec. 17642.

The legislative history is thus explicit that Section 4208(b) was designed to increase the time within which the district judge could reduce the sentence and that Congress intended that the section be administered in the light of Rule 43 which dispenses with the presence of a defendant at the time sentence is

reduced. Strange, indeed, would be an absolute requirement that the offender must always be returned to have his sentence reduced after a scientific study has been made, but that, if no study is made, his sentence can be reduced without his presence. The answer is that Congress never contemplated that a defendant would automatically be returned for modification of sentence under Section 4208(b).

C. THE WEIGHT OF AUTHORITY SUPPORTS THE VIEW THAT RETURN OF THE PRISONER IS A MATTER RESTING IN THE SOUND DISCRETION OF THE DISTRICT COURT

Until the present case and the subsequent decision in *United States v. Johnson*, 315 F.2d 714 (C.A. 2), certiorari pending, No. 123, O.T. 1963, there appeared to be little doubt that the matter of returning the defendant to the courtroom was one of discretion and not of necessity.

Commentators who delved into the background of the legislation inevitably reached this conclusion. See, e.g., Judge Kaufman, *Enlightened Sentences Through Improved Technique*, 26 Federal Probation (September 1962) p. 7; 23 Federal Probation (June 1959), p. 59; 26 F.R.D. 231, 262; 27 F.R.D. 293, 339, 357. The matter was discussed at the Sentencing Institute for the Ninth Circuit, July 8, 1960 (27 F.R.D. 287). The late Judge Goodman explored the various views, noting that the issue involves a "question of due process to some extent." 27 F.R.D. 293, 334 (see *infra*). He indicated that, after consideration, the Northern District of California had adopted the following rule (27 F.R.D. 293, 336-337):

It was unanimously agreed that the Chief Judge should notify the Director of Prisons that this Court has no policy with respect to the return of defendants sentenced under Section 4208 for final sentence, but that determination as to whether this should be done or not was a matter remaining in the discretion of the Judges of the Court, and dependent upon the circumstances of each case.

He then explained (*op. cit.* 337) :

We devised that rule because we felt that depending upon each case, the persons involved, the nature of the sentence finally imposed, the decision of the Judge in that regard, what might be due process with respect to the presence of the defendant at the time of final sentences might be different, possibly, in different cases.

It was Judge Goodman's view that, in cases of doubt, it would be safer to bring the defendant back, but that he did "not hold to the view that in every case the defendant should be brought back" (*op. cit.* 345).

The Court of Appeals for the Second Circuit, in *United States v. Johnson*, 315 F. 2d 714, 716, cites the opinion expressed at the Highland Park, Illinois, Institute in 1961 in support of its position that presence is required at the modification of sentence. As we read the reports, however, the opinion there expressed is almost the same as that of Judge Goodman above. See 30 F.R.D. 401, 439-440.

The district courts have treated the issue as one addressed to their discretion. *United States v. De Blasis*, 177 F. Supp. 484 (D. Md.); *United States v. Johnson*, 207 F. Supp. 115 (E.D.N.Y.), reversed on

appeal, *supra*, certiorari pending, No. 123, O.T. 1963; *United States v. Rozanc*, 210 F. Supp. 900 (W.D. Pa.). See also *United States v. Behrens*, 190 F. Supp. 799 (S.D. Ind.); *United States v. DeBlasis*, 206 F. Supp. 38 (D. Md.)." So far as we know, no district judge has felt himself bound, in all circumstances, to request the return of a defendant. This is an area, we suggest, in which the views of the district judges are entitled to particular weight, for under our system the responsibility for the sentence rests with them. The district judge has discretion whether to invoke the statute in the first place. He has discretion whether to follow the recommendation of the Bureau of Prisons. He ought also to have discretion to determine whether he would be aided by a recall of the defendant, from whom he has already heard.

II

DUE PROCESS DID NOT REQUIRE THE PERSONAL PRESENCE OF RESPONDENT AT THE TIME HIS SENTENCE WAS REDUCED

A. PRESENCE IS NOT AN ELEMENT OF DUE PROCESS WHERE THE PERSONAL APPEARANCE OF A DEFENDANT WOULD NOT MATERIALLY AID IN DISPOSITION OF THE ISSUES INVOLVED

The majority opinion of the court below and the opinion of the Second Circuit in *United States v.*

²⁴ *Grabina v. United States*, 369 U.S. 426, in which the sentence was vacated and remanded on suggestion of the Solicitor General is inapposite and has frequently been misinterpreted. In *Grabina*, the original sentencing was deferred when Grabina first appeared before the judge. A written sentence was imposed later without Grabina's presence. Hence, neither at the time when sentence was imposed nor when it was modified was Grabina accorded the right to be present.

Johnson, 315 F. 2d 714 (pending on petition for a writ of certiorari, No. 123, this Term), hold that a defendant must be returned to the courtroom if sentence is reduced under Section 4208 because the right of a defendant to be present at the time sentence is imposed is an aspect of due process.²⁵

There is, of course, no constitutional provision expressly conferring a right to be present when sentence is reduced, or even when sentence is imposed. Indeed, the Constitution does not specifically mention presence at all. See *Frank v. Mangum*, 237 U.S. 309, 346 (dissenting opinion of Justice Holmes). The Sixth Amendment refers only to the right of a defendant "to be confronted with the witnesses against him." To be sure, this has generally been interpreted to require the presence of the defendant during all steps of the criminal trial leading to the adjudication of guilt. But even where the question is one of presence during the course of the trial, the rule has not been inflexibly applied. The courts will consider whether the defendant's presence on the particular occasion could materially affect the outcome. For example, a defendant's presence is not required at the trial when counsel is arguing a question of law, *Johnson v. United States*, 318 U.S. 189, 201, or presenting a motion, *Barber v. United States*, 142 F. 2d 805, 806-807 (C.A. 4);

²⁵ For this reason, the merits of the issue are bound up in the question of whether the alleged error is one which can be raised under 28 U.S.C. 2255. If respondent's presence was a fundamental requirement of due process, then it is the kind of issue which could be raised by motion under 28 U.S.C. 2255. And, if defendant's presence is essential, he also would of course be entitled to have counsel present.

United States v. Lynch, 132 F. 2d 111, 113 (C.A. 3); *Ormsby v. United States*, 273 Fed. 977 (C. A. 6). See, generally, Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Col. L. Rev. 18.

The right to be present at the time of sentence has different origins. This Court has recognized that the sentencing process is discrete from that by which guilt is determined. Both the majority and dissenting opinions in *Snyder v. Massachusetts*, 291 U.S. 97, 107, 129, affirm this distinction. And in *William v. New York*, 337 U.S. 241, 251, this Court declared that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." The crucial consideration here is that the process of fixing sentence is non-adversary. Once the determination of guilt has been made, the trial judge should exercise his discretion in an atmosphere free from antagonism, with all the aids which modern criminology can supply.

For reasons stemming from procedures which in modern times would be considered lacking in due process—i.e., the prohibition against a defendant's testifying at his criminal trial—the common law recognized the right of a defendant to speak in his own behalf before sentencing in order to offer a plea of pardon or in arrest of judgment. That right of allocution has retained sufficient vitality for other purposes to have persisted in our jurisprudence. *Green v. United States*, 365 U.S. 301, 304. And since the right of allocution necessarily involves a right to be present in person, it was almost inevitable that the

right of a defendant to be present at the trial and the right of the defendant to be present at sentencing tended to merge. As a result, considerable confusion arose as to whether a defendant had to be present when a change was made in his original sentence, even though the change was for his benefit and his presence could serve no useful purpose. An example is *Price v. Zerbst*, 268 Fed. 72 (N.D. Ga.), where the court held invalid a sentence which, without the prisoner's re-appearance, had been changed from three years to two and a half years because the original three-year sentence had been improperly pre-dated by six months.

That such a wooden application of the right to be present was not required under the Constitution was recognized by the drafters of the Rules of Criminal Procedure. As noted earlier, the last sentence of Rule 43, F.R. Crim. P., provides: "The defendant's presence is not required at a reduction of sentence under Rule 35." The advisory notes state:

The purpose of the last sentence of the rule is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant ~~not~~ to require such presence, because of the delay and expense that are involved.

See, also, Dession, *The New Federal Rules of Criminal Procedure: II*, 56 Yale L. J. 197, 246; *United States v.*

Woykovsky, 297 F. 2d 179 (C.A. 7), certiorari denied, 369 U.S. 867.

Since the adoption of the Rules, there has been no doubt expressed on the proposition that a sentence may be reduced or corrected for the benefit of a prisoner without requiring him to be personally present when "the beneficial change is made." The unquestioned validity of the provision in Rule 43 demonstrates that the presence of the defendant is not an essential ingredient of due process in all situations. Cf. *Yates v. United States*, 356 U.S. 363, 367, where this Court on review of convictions for contempt determined that the sentence should be reduced to the period already served in confinement.

Thus, the constitutional issue comes down to this: Do the particular procedures which are followed when Section 4208(b) is invoked make it essential, from the standpoint of fundamental fairness, to provide for allocution on two occasions? We believe not.

As we have shown *supra*, and as discussed in our brief in *Corey*, No. 31, O.T. 1963, the statute contemplates that all the usual processes of sentencing will be completed before a study is ordered, i.e.—a presentence report; an opportunity for both counsel and defendant to be heard; a sentence which is actually

* The English system has likewise moved from inflexibly rigid requirements, *Hales*, 17 Cr. App. Rep. 103, 1 K.B. 602; *Casey*, 23 Cr. App. Rep. 193, so as to permit reductions in sentence without the delay and expense of producing a prisoner. *Jowsey*, 11 Cr. App. Rep. 241; *Thomas*, 28 Cr. App. Rep. 21. Appellate courts have long been allowed by statute to pass sentence in the absence of the appellant. Criminal Appeal Act, 1907 (c. 23), s. 11(2), 5 Halsbury's Statutes of Eng., 2 ed., 926, 933.

incorporated in a judgment and forms the basis for a commitment to a federal penitentiary.

We recognize that, in many situations, the maximum sentence imposed when the study is ordered is not, in the mind of the judge, the sentence which he would ultimately impose, with or without the study. It is this factor which apparently led the court below and the Second Circuit to hold the presence of a defendant necessary when, after study, the sentence is affirmed or modified. This, however, seems to us to introduce unnecessary rigidity into a scheme of sentencing carefully designed to be flexible and responsive to the need of rehabilitating offenders. Aside from consultation as to appeal—which, as we show in *Corey*, should occur at the time the case is concluded—the only reason to require the presence of a defendant at the time of sentencing is to afford him an opportunity to bring to the attention of the trial judge, in his own words, personal factors peculiarly within his knowledge. There is no reason to suppose that the defendant's right of allocution cannot be meaningfully exercised before the trial judge makes the decision to utilize the procedures of Section 4208(b), i.e., before the entry of the judgment of conviction which concludes the criminal case and results in the commitment of the defendant to prison. The considerations which a defendant might offer in favor of leniency—mitigating circumstances, contrition, family conditions, etc.—can all be brought to the attention of the judge at that time. If, at that point, a conscientious judge concludes that he might profit from an expert diagnostic study, that surely does not

compel the conclusion that he would be aided by a reappearance of the defendant whom he has already observed throughout the trial and from whom he has already heard, both in person and through counsel.

Of course, where the results of a study raise questions in a judge's mind or where there are factors which a judge wishes to emphasize to a defendant, he is free to summon him once again. But because this may be desirable in some cases does not mean that it is desirable in all or that it approaches constitutional necessity. A defendant has no right to test out-of-court information of which the judge avails himself in individualizing the sentence, *Williams v. New York*, 337 U.S. 241, and having once been granted the full right of allocution, he is not entitled as a matter of right to a second opportunity."

The procedures of Section 4208(b) are optional; they are used only when a judge feels that he will be aided by expert diagnostic guidance; they offer, from the defendant's standpoint, the prospect of substantial amelioration—a prospect beyond "due process." If, in order to avail himself of added guidance, the judge must invariably bring the defendant back for a further hearing and make certain that counsel (often ap-

" Section 4208(b) does not provide that the diagnostic study should be made available to a defendant. Similarly, a presentence report prepared under Rule 32(c), F. R. Crim. P., is not exhibited to a defendant, although, of course, the judge may, in his discretion, disclose portions of it or question the defendant about the information contained therein. *Friedman v. United States*, 200 F. 2d 690 (C.A. 8), certiorari denied, 345 U.S. 926; *Hoover v. United States*, 268 F. 2d 787 (C.A. 10). But cf. *Smith v. United States*, 223 F. 2d 750 (C.A. 5).

pointed) will return to the case some three to six months after it has otherwise been concluded, we anticipate considerable reluctance on the part of trial judges to invoke Section 4208(b). This would benefit neither the administration of justice nor defendants generally.

B. IN THIS CASE, THERE WAS NO REASON WHY THE DEFENDANT SHOULD HAVE BEEN PRESENT WHEN HIS SENTENCE WAS REDUCED FROM TWENTY TO FIVE YEARS

This case affords an excellent illustration of our point that due process does not require the personal return of the defendant simply because the procedures of 18 U.S.C. 4208(b) have been utilized. Respondent was given every opportunity to speak in his own behalf before the judge decided to invoke 18 U.S.C. 4208(b). See R. 11-13. He declined to express contrition or to offer anything by way of mitigation—"My remarks ain't fit in your ears" (R. 13). The judge indicated that, in his opinion, respondent merited a long sentence, but that he had found that heavy sentences did not act as a deterrent to the commission of penitentiary offenses. He made it clear that in this matter of internal discipline he would be guided by the views of the prison authorities. Respondent's sentence was in fact reduced from twenty years to five years, with the further provision that the Board of Parole could decide when the respondent should be eligible for parole, thus allowing for still earlier release if he responded to rehabilitative measures. It is difficult to

imagine what more respondent could have gained by his presence.²²

In sum, there is nothing in the conduct of this case which even remotely suggests that there was a practical necessity for conducting a trial-type hearing. Respondent was present at every stage at which his presence would be meaningful. He was afforded a right to speak in his own behalf after the adjudication of guilt and before the court imposed the sentence which concluded the criminal case. Utilization of the procedures of Section 4208(b) has resulted in a full, fair and informed consideration of the sentence to be imposed and in an ultimate disposition notable for its leniency.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

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AUGUST 1963.

²² Indeed, respondent's motion under 28 U.S.C. 2255 did not raise any claim of prejudice from his absence at the time of sentence. He complained about alleged trial errors and remarks at the time of the *original* sentencing.